

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue Date: 03 February 2005

CASE NO.: 2004-LHC-576

OWCP NO.: 07-157370

IN THE MATTER OF:

LEO FERGUSON,

Claimant

v.

NABORS OFFSHORE CORP.

Employer.

APPEARANCES:

ROBERT L. BECK, JR., ESQ.

For The Claimant

KEVIN A. MARKS, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for attendant care benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the "Act"), brought by Leo William Ferguson ("Claimant") against Nabors Offshore Corporation ("Employer").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing for August 23,

2004 in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered five exhibits and Employer proffered seven exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from Claimant on September 10, 2004, and Employer on September 13, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties orally stipulated, and I find:

1. Claimant is permanently and totally disabled.
2. Claimant's average weekly wage at the time of injury was \$971.40.
3. Claimant currently receives permanent total disability benefits at a compensation rate of \$691.00 per week.

II. ISSUE

The unresolved issue presented by the parties is whether Claimant is entitled to home health care assistance for 12-hours per day or whether Nabors' compensation for six-hours per day is reasonable and appropriate.

At the formal hearing, the record consisted of the testimony of Claimant; Yolanda Ferguson, Claimant's wife; Mary Jo Ferguson, Claimant's mother; and Ross McBryde, Director of Program Management for F.A. Richard, along with exhibits submitted by the respective parties.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer Exhibits: EX-____.

III. STATEMENT OF THE CASE

The Testimonial Evidence

LEO FERGUSON

Claimant was born on November 21, 1969, and was 34 at the time of the formal hearing. Claimant married Yolanda Ferguson about five years ago and has two children. (Tr. 18).

Claimant lives in Bunkie, Louisiana, a small city located almost exactly between Opelousas and Alexandria, Louisiana with a population of about five to six thousand people. There is a small, rural hospital located in Bunkie; however for specialized healthcare, such as an orthopedic, cardiologist or rehabilitation doctor, Claimant must travel to at least Alexandria. Claimant lives in the country about five and one-half miles south of Bunkie. His closest neighbor is approximately one-quarter of a mile away. It is mostly a farming area. Claimant has lived in his current home for almost four years. His home is located on 20 acres which he purchased after high school. Sixteen acres of his property is wooded and four acres are clear. Claimant lives on those four acres. (Tr. 19-20).

Claimant was injured on July 2, 2000, when working as a driller, he fell off the side of the rig floor and broke his neck in four places. Claimant suffered a spinal cord injury. He was originally taken to Terrebonne Medical Center in Houma, Louisiana, but was later transferred to Touro Medical Center in New Orleans. When he was in Terrebonne, Claimant was paralyzed from the neck down. Claimant was in Touro Medical Center's rehabilitation program for approximately four months. While in Touro, some of Claimant's functional ability returned. As of the formal hearing, Claimant's right side is the most impaired, with some impairment to his left side. (Tr. 21-22).

Upon leaving Touro Medical Center, Claimant was sent home. He remained in an outpatient physical therapy or rehabilitation program. For about one month Claimant received rehabilitation treatment from HealthSouth Network, in Alexandria, but Claimant did not think it was helping him enough. Thereafter, Claimant switched to Dr. Gerald Leglue's program and began a comprehensive rehabilitation program with Dr. Leglue. (Tr. 22-23).

Claimant described his "level of impairment" regarding his right side. He testified there was "not too much [he] could do" with his right arm. Claimant could, however, lift his right arm to the height of a table. Claimant further testified his right leg was weak. He described his ability to walk with the use of an Ankle Foot Orthosis ("AFO") on his right leg. The AFO holds his toe in the "up position" so his foot does not drag when he walks. Claimant testified the AFO was uncomfortable. It also "burns the bottom" of his foot. He believes this is from nerve damage. The AFO also rubs the side of his ankle. Claimant just had the AFO modified last week - he had it cut down "to try to get some of the rubbing out of it." Claimant admitted the AFO assists him in walking without stumbling. Claimant also wears an over-the-counter knee brace on his left knee "because it carries the bulk of the load" off his body. He explained the pain in his knee is because his left leg has to do most of the work since his right leg does not work that well. (Tr. 23-25).

Claimant continued to receive medical treatment since returning home. Dr. Leglue monitors his medicines. Claimant also started seeing Dr. Snyder, in Marksville, a family doctor who keeps up with Claimant's blood work and other general treatment. Dr. Snyder also tried to help Claimant with his bladder and bowel problems by trying "out some medicines." Claimant also testified to seeing a psychiatrist, Dr. Irby, once every three months. His wife keeps track of his doctors' appointments. Claimant also received treatment from a psychologist, Darla Gilbert, but it has been a while since he has seen her. Claimant saw Dr. Irby and Dr. Gilbert for depression and anger. (Tr. 26-27).

Dr. Webb, an ENT, in Alexandria treated Claimant for sinus problems. Dr. Webb performed one surgery on Claimant, but the effect of the surgery only lasted three months, instead of the three years suggested. Consequently, Dr. Webb sent Claimant to Dr. Shastone who did another sinus surgery on Claimant, put stints in his forehead, and started him on allergy medicine and shots. Claimant's allergies have a great affect on him. At night he has trouble breathing and his nose stops up, waking him up. He also gets tired and weak because it runs him down. Therefore, Claimant stays sick a lot. (Tr. 27-28).

Claimant sees a massage therapist for a deep tissue massage three times a week. The therapist stretches him and then does the deep tissue massage. The massages help him with his pain. He also sees "Hanger" when he needs his brace adjusted or modified. Finally, Claimant testified as to treatment with Dr.

Burlot, once every three months, for Botox injections in his right hand and the right side and back of his neck. The Botox injections are given in order to paralyze the muscles from "spasticity, to keep them from drawing up, [and] to relax them." (Tr. 28).

Claimant testified to wetting the bed and having other accidents when he cannot make it to the restroom. These accidents relate to both his bladder and bowel problems and have been ongoing since he left the rehabilitation hospital. Claimant saw Dr. Alvarez, a gastroenterologist, who is located in Lafayette, Louisiana. Since the rehabilitation hospital, Claimant has tried various bowel and bladder programs. These programs have not solved his problems. Claimant testified he does not have "very much control" over his bowel or bladder. At nighttime he has a particularly difficult time with his bladder and bowel. If he is lying in bed, his wife helps him get out of bed and, because he does not have his brace on, he is stiff and can hardly move. His wife must help him go to the bathroom quickly and "there's just no hurrying anymore." Therefore, he does not always make it to the bathroom. Claimant testified these "accidents" sometimes happen in bed and once in the shopping mall. He does not know when these accidents are going to happen. "If I knew when it was going to happen I would stay in the bathroom that day, you know." (Tr. 29-31).

When Claimant goes to therapy he wakes up between 6:00 and 6:30 a.m. His wife helps him get out of bed and into the shower. He showers himself and then his wife helps him get out of the shower. His wife helps him dry off and get dressed. Claimant can put the knee brace on by himself, but the AFO stays in his shoe and comes off with the shoe. Claimant mostly wears lace-up boots, loose fit blue jeans and T-shirts. He cannot button a shirt or lace his boots, his wife laces and ties his boots for him. Claimant bought special laces that assist a handicap person. After he "slides it down," he tucks the laces into the boot. It takes Claimant "anywhere from an hour to an hour and a half" in the morning to get showered, dried off, dressed with his braces on and eat breakfast. (Tr. 31-33).

There are also days where Claimant is more functional or less functional than others. The weather has an affect on how he functions. Therefore, there are days in which he can help more with his own care than others. His wife always cooks his breakfast, even prior to his injury. Claimant testified he knew how to fry a hamburger or an egg and that he "used to cook them." (Tr. 33-34).

Claimant goes Alexandria three days a week for massage therapy. His wife drives him to these appointments. He is in therapy anywhere from an hour to an hour and fifteen minutes. It is usually lunchtime by the time Claimant completes his therapy. His wife drives him home and he eats lunch. By this time, Claimant is "pretty tired because, just get wore down dragging your leg around and just trying to move . . . it just wears you down physically." Everything he does "takes so much . . . effort it wears you down . . . get tired." (Tr. 34-35).

After lunch, Claimant usually lays down for about an hour and one-half. His wife helps him get undressed. Claimant cannot rest with his brace on because it keeps his foot straight up and "it's uncomfortable." He takes his nap in his bed. Claimant does not believe he would be able to get himself off his couch if he lied there for his nap. He admitted that he "might be able to but it would take me a while to wrestle around and . . . grab something and pull myself up." (Tr. 35-37).

Claimant has problems balancing and falls a lot. The AFO has helped "some," but he still falls "a pretty good bit." He would "fall a whole lot more if I didn't have the AFO." Claimant can only get himself up off the floor if there is something around him that he could pull up on. If he fell in the middle of a floor where there was nothing near him to pull himself up, then he could not get up on his own. (Tr. 37).

After Claimant's nap, his wife helps him get out of bed and dressed again. Then he goes outside and works on "whatever I'm working on that day." Claimant likes "to keep a project going all the time, something he can work on."

We built my wife a little wagon that you pull behind the lawnmower so she can put the garbage on and haul to the road behind the lawnmower. I took an old propane tank and made an air compressor tank out of it, and I built [daughter] a kind of like a little deer stand. . . . she's always wanting to go hunting.

Claimant fabricated these projects with welding equipment. He has a chop saw with which to cut the metal and "we build it." He does not do these things by himself. Either his wife, his mother or father come and help him. His father comes by a lot and asks Claimant if there is anything he needs help with.

Since he cannot get down on his knees or bend over, his wife bought him a stool that has wheels on it. He sits on this stool and roll around to wherever he is working. When he welds two pieces of iron together, someone helps him hold it and he just "tac it." If he needs it flipped over, whoever is helping him will flip it and he would continue working on the project. Claimant does these projects "[t]o get out of the house, to keep my mind busy instead of . . . dwelling on the situation . . . so I have something to look forward to." Claimant contends these projects help him with his depression. (Tr. 35, 38-39).

Claimant's wife cooks his dinner. In addition, if he needs anything from town his wife would bring him into town or get it herself. If Claimant does not have his AFO on, his wife helps him walk. Claimant keeps a cell phone with him on his belt loop and if he is "out in the yard . . . and fall down . . . I can call her and she'll come and help me up." Moreover, Claimant's wife helps stretch him when he cannot move. She will stretch his shoulder for him to "get it where [he] can function a little bit better." "[W]hatever I need help with they're there to help me." He has a hot tub to relax his muscles which his wife helps him get in and out of. During the day or night, whoever is watching Claimant will rub him down with "Blue Emu Oil." Claimant also uses a heating pad. He cannot position the heating pad by himself because once he lies down he cannot move and "pretty much just laid there." (Tr. 40-41).

When Claimant has bladder or bowel accidents his mother, wife or brother help clean him up. His wife cleans the accidents which happen while Claimant sleeps. She changes the sheets and helps him into the shower to clean off. (Tr. 41-42).

Claimant can open a jar of food after it has already been opened once before and is "not real tight, if it's tight it'll just spin under my arm." Claimant cannot use a can opener or spread peanut butter on a slice of bread because he ends up tearing the bread. (Tr. 42).

For his allergies, Claimant gets allergy shots and has two different kinds of medicine - Zyrtec and Allegra. His sister and his wife have given him his allergy shots. His sister, a nurse, showed Claimant's wife how to give the shots, but most of the time his sister administers them. Claimant also takes oral medications everyday. He cannot open the pill bottle if it is child proof. During the day he sometimes needs additional medication on an as-needed basis. His wife provides him with any necessary medications throughout the day. Claimant

testified he has side effects from the allergies or medications, including dizziness, stuffy nose and a lot of itching. Claimant had problems with excessive itching while he was in the hospital. He claims he has difficulty reaching many places on his body which itch. When he was in the ICU, his brother, wife and mother took turns "using a fork or a brush" and would just "scratch all the time." Claimant testified he still itches "a lot." (Tr. 43-44).

On cross-examination Claimant testified he built a new house with the \$100,000.00 he received from Employer. The house he built is "more or less just wide open and it's wheelchair accessible. You know, wide doors, has the handicap commode, handicap shower with the grab rail." Claimant uses the wheelchair if he goes on a long trip or if he will have to walk a lot. He also used the wheelchair when he had the flu and got too weak to walk. He last used the wheelchair was last summer when he went to Mexico on vacation and his "brother [came] with us so he could push me around." Claimant admitted however, typically around the house, unless he has the flu, he does not need the wheelchair and at one point was walking with only a cane. (Tr. 45-46).

Claimant could not recall the last time he saw Dr. Gilbert, the psychologist, but stated it was possible that the last time he saw her was in 2002, the date of the report on record. Claimant testified his wife would have a better idea of when he last visited the psychologist, since she takes care of all his doctors' appointments. He does not have any follow-up appointments scheduled with Dr. Gilbert. Claimant explained he stopped going to Dr. Gilbert because Claimant and his "wife had got in a fuss, and me and her momma had got in a fuss . . . it just wouldn't work . . . no use wasting your money and my time, you know." (Tr. 47).

Claimant has a king-size bed. The bed does not have any modifications for his disabilities. If Claimant is not in a hurry or does not feel an accident coming on, most of the time he can get out of bed by himself. Claimant can sometimes use the restroom by himself, but deals with diarrhea and constipation. His wife does not have to be in the room when he is using the restroom. Although Claimant needs help getting in and out of the shower, once he is actually in the shower, he can bathe himself. Claimant admitted he mostly wears pocket T-shirts and get those on and off by himself. He gets the T-shirts extra-large so they will be easy to slip on. Claimant

stated that if he gets sweaty the shirts stick to him and he has difficulty getting them off and needs help. (Tr. 47-50).

Claimant reiterated from the time he gets up, eats and showers, it takes him about one hour and one-half to get ready. During this one hour and one-half, there are situations where his wife must help him, but there are a lot of instances where he does it on his own as well. Claimant's wife is a stay-at-home mom. She helps Claimant get into the shower and then gets the kids ready. (Tr. 50-51).

Claimant does not wear the AFO all the time. He testified that once he gets undressed he does not have the AFO on. He admitted he can get around his house without the AFO, but it is "kind of tricky but what I do is drag my foot and slide it across the floor and I don't pick up my foot." (Tr. 51).

On cross-examination, Claimant could not recall the last time he wet the bed, but guessed it was "probably a month" ago. He could not testify as to how many times in 2004 he had an accident with his bladder. He could state with certainty that it was more than five times, but could not give an estimate. Claimant admitted, however, that it was not an everyday occurrence and he could sometimes go a week or two without any accidents. He has wet the bed twice in the same night, but when he knew it was going to happen he would stay in the bathroom. (Tr. 51-52).

Claimant has more accidents with his bladder than he does with his bowel. He had a bowel accident in the mall once. He could not recall how many times, outside the presence of his home, he had accidents. Claimant's diet affects his bowel movements. If he watches what he eats he has more control over his bowels. (Tr. 52-53).

Claimant undergoes a regime of Thera-Vac enemas to keep regular. He testified that most of the time the enemas work, but not lately. He denied wearing a diaper, but has tried them. Claimant stated they were really uncomfortable and gave him a rash, "and, I know it's a shame and it's a sin, but it's pride too, a lot of it's pride, you know, being honest, but they're real uncomfortable." Although Claimant acknowledged he would not have to get up and change the sheets if he wore a diaper, he claimed he would still need to get up and take a shower. The "accidents" are not everyday occurrences and the situation has improved since he has left the hospital. (Tr. 53-54).

Furthermore, Claimant's falls have leveled out over the last couple of years and when he does fall, he can pull himself up if there is something around him to grab onto. He went to the emergency room once or twice after falling, but could not recall if it was within the last two years. With the AFO, Claimant has been able to walk without a cane. Claimant could not recall the last time he fell. He acknowledged it was about three weeks ago because he still has a scar on his back from the last time he fell. The last fall was not a situation where he could get up by himself, but he had a friend there to help him. (Tr. 54-56).

Claimant discussed his daily activities. He does not do any work around the house, such as chores or dishes. He might hand his wife a dish, but he does not scrub them clean. Claimant does not cook either, but admitted he never did. Prior to his injury, Claimant's wife did all the cooking, except for Sundays before church, he would make "them my special, ham, egg and cheese sandwich." Claimant believes he could prepare simple ready-to-eat microwave dinners. He usually just works under the carport, where he keeps his tools. (Tr. 56-58).

Claimant discussed activities he is able to do with his daughters. He is able to answer questions if his oldest has problems with schoolwork. If Claimant's brother is with him, Claimant may take his daughter fishing. Claimant goes fishing with his brother and oldest daughter, but just watches them. There have been times where he is in the house watching the children, but he claims his children help him a lot, especially the three year old. This happens if his wife needs to run into town, but if something happens, he can call his mother, father, or brother - they live "right up the road." (Tr. 58-59).

Claimant has a home computer. He has problems typing because of his left and right hand. Claimant testified his left hand is not normal either and if he uses a "pen and write a little while it'll draw up too, like typing and stuff, it just draws up." He has no problems using the mouse. (Tr. 59-60).

Claimant is able to brush his teeth, comb his hair, and shave. If he misses a few spots when shaving he gets it the next time. (Tr. 60-61).

Claimant built an air compressor out of an old propane tank to fix flats on his lawnmower or tractor. When he gets a flat, he can call his mother and father and they can come over and help him change it. Now, instead of going five miles to the

service station, he has the air compressor with him. He can use the air compressor by himself because all he has to do is plug it in. (Tr. 61).

Claimant admitted he occasionally rides his tractor and cuts the grass. Claimant used to own two tractors, but now only has one. Claimant acknowledged he drove a motor vehicle to his mother's home a few times, but he does not have a driver's license. Claimant lives about one-half a mile from his mother's and it is almost a gravel road. (Tr. 61-63).

Claimant denied being discouraged, by any doctor, from riding his tractor, welding, or woodworking. In fact, he claims they have all encouraged him to do these activities. Claimant explained he is not a house person and cannot just sit around because he has worked hard all his life. He always has somebody like his brother, father, or brother-in-law helping him, when he welds or woodworks, to maneuver things into position. There are times when he is able to work by himself. (Tr. 63-64).

Prior to Claimant's injury, his wife worked as a legal secretary and his oldest daughter was in daycare. The days Claimant had off from work he would watch his daughter. Claimant did not recall testifying in his deposition that his wife was laid off and collected unemployment. He stated his memory was "not all that great." (Tr. 65-67).

Claimant's mother works as an aide five days a week for Avoyelles Parish School Board. His mother comes to his house on the weekends to help him do things. If he needs her during the week, she comes after work hours. His mother does not just come during the weekend, but is there more on those days. Claimant acknowledged having a close relationship with his mother, stating "just being with her, it helps me . . . not be so angry, just talking to her." (Tr. 67-69).

On re-direct examination, Claimant testified his mother sometimes took him to his therapy sessions, but that his wife mostly took him. (Tr. 68-69).

Claimant has a 35-horsepower tractor. He explained if he needs to stop in a hurry, he stops by dropping whatever he has hooked up on his three-point hitch because it drops like an anchor. He admitted he ran over his dog once because Claimant could not stop the tractor in time. (Tr. 69-70).

Claimant explained what he meant by his falls leveling off. He still falls quite a bit, but it is "probably never going to get any better" than what it is right now . . . "it's probably as good as it's going to get." (Tr. 72).

YOLANDA FERGUSON

Yolanda Ferguson ("Yolanda") is Claimant's wife. They married on October 23, 1999, about one year before Claimant's injury. At the time of Claimant's injury, she was employed by an attorney in Alexandria, as his secretary. She worked as a legal secretary for six years prior to Claimant's injury. She earned \$2,300 per month, plus bonus and medical insurance. She left her employment in December 2000 to care for her husband. Yolanda denied being laid off and denied collecting unemployment. (Tr. 73-74).

Yolanda described a typical morning in her house. When Claimant wakes up, she helps him out of bed and feeds him breakfast. She admitted there were days when he is harder to help out of bed than others. This occurs when Claimant is stiff and cannot get up, thus she will help him get into a sitting position. She also admitted there were days where Claimant could sit up by himself, but she always has to help him get out of the bed. She noticed the weather has an affect on Claimant's functional abilities and exercise affects his ability to get out of bed. (Tr. 75-76).

Once Claimant is out of bed, they go to the kitchen and she fixes him breakfast. After Claimant eats his breakfast, she takes him to the shower and helps him get in. He does not need help showering or going to the bathroom, just getting there. When Claimant gets out of the shower, she helps dry him off and get dressed. She claimed the only thing Claimant can do by himself is put on his underwear and maybe a shirt if it's loose enough. Claimant cannot put on his socks, deodorant, his boots, AFO, etcetera. She does all these things for him. (Tr. 76-77).

About three to four times per week, they usually go to massage therapy. When they return from therapy, it is usually lunchtime and she fixes Claimant something to eat. She provides the transportation to and from therapy. Sometimes, they will be halfway to the therapy appointment and Claimant needs to go to the bathroom, accordingly, she will turn around and take him home. Yolanda described both urinary and bowel accidents. She acknowledged Claimant has had an accident within the last three months. When he has the accident, it might just happen once and

then not again for awhile, however, if it is his bladder, he sometimes has three accidents in one day or he could go one month without having one. (Tr. 77-78).

Claimant's last bowel accident occurred within the last three months. She cleans him up after such accidents. Claimant has only had bladder accidents while in bed, during the night. If Claimant has an accident, she gets up during the night, changes the sheets and puts them in the wash, then puts new ones on the bed. When Claimant has to go to the bathroom at night, she helps him because he does not have his brace on. He has difficulty going to the bathroom without his brace because his foot may drag, he may get caught in the carpet and fall. When Claimant wakes up in the middle of the night and needs to go to the bathroom, he needs somebody there or he would have to put his brace on. (Tr. 79-81).

Claimant does not have accidents every night. Yolanda could not specifically state how often she needs to get up with Claimant. She admitted "[i]t varies. I mean he wakes up some nights where I have to rub . . . he's hurting and I have to rub ointment on him. He may have to go to the bathroom." When Claimant is hurting, she will rub "Bio-Freeze" or Emu Oil onto Claimant. It is not something you rub like a massage, but "just apply it." (Tr. 81).

Yolanda assists Claimant onto his recumbent bike by wrapping something around his foot and pedal because Claimant is not able to put his foot onto the pedal. She also helps him pull down, because his arm will not go all the way back. She stretches him when he cannot pick up his arms. In order to stretch Claimant, she picks him up from the back and raises his arm up and stretches it. She also straightens his fingers out on his right hand, but does not do this as often as she stretches Claimant's arm, which is about once or twice a week. Claimant complains of stiffness when his arm is stretched, but the massage therapy helps him a lot. (Tr. 82-83).

Throughout the rest of the day, Yolanda stays by her husband, in case he needs help. For example, if Claimant is outside, he needs somebody to walk with him because of the uneven ground. She explained "there's so many little things I do everyday." Although Claimant's sister usually gives Claimant his allergy shots, Yolanda has given him a few as well. (Tr. 83-84).

Yolanda prepares all of Claimant's medications. She has a medicine container which she fixes for Claimant for the week. Claimant takes medication three times a day, as prescribed and also other medications which he takes as needed throughout the day. Claimant is unable to open the medications by himself. He has medication for his stomach problems, sleeping problems, depression, and spasms. During the day, Claimant takes medication for his stiffness and pain. In addition, Claimant takes medication for depression. He is prescribed OxyContin to be taken every 12 hours. In between taking OxyContin, Claimant takes Tylenol or Aleve for the pain. There are no other prescribed pain medications. He does take an anti-spasmodic medication, Baclofin, and nerve pain medicine, Neurontin, on a daily basis. Claimant is prescribed two medications for his depression - Wellbutrin and Lexapro. (Tr. 84-87).

As a result of all his medications, Claimant recently began seeing a doctor for regular blood work. Although Dr. Mark Snyder completed the blood work, no one has read the results yet. Dr. Snyder is located in Marksville and sees Claimant about once every two weeks. Dr. Snyder also helps Claimant with his stomach problems, specifically his bowel irregularity such as constipation or diarrhea, in order to find some sort of balance. Yolanda drives Claimant to Marksville for these appointments. Marksville is about 25 miles from Claimant's home. (Tr. 87-88).

After Claimant returns from his therapy sessions, he usually needs a nap because he is very tired and stiff. Claimant sometimes takes three naps in one day. On average, Claimant needs a nap four or five days out of the week, especially the days he goes to therapy. (Tr. 88).

The rest of her day depends on what Claimant wants to do. "If he wants to go outside and play around with something, if he needs something, you know, at the store I have to go get that . . . I'm his right hand." (Tr. 89).

She is familiar with Claimant's welding projects. "He built me a cart to haul my trashcans. He build [sic] an air compressor. I had to basically do everything on that one except . . . he tells me what to do and that's what I do." Claimant has the idea and concept and she does the manual labor. The purpose of these projects is to keep Claimant from becoming depressed. By depressed, Yolanda means he "sleeps [and] starts fussing." Claimant has been angry since his injury to the point where she has left their family home. Yolanda admitted there

has been an actual physical separation since Claimant's accident. The longest separation period lasted three days. When she left, Claimant's mother and brother were there to help Claimant with all his needs or Claimant went to his mother's home. (Tr. 90-91).

Claimant gets depressed if it is raining and there is nothing for him to do inside. The depression causes Claimant to want to sleep. "Basically he goes to bed and he'll just stay in there most of the day." Claimant does watch some television, but not much and has never been one to watch a lot of television. (Tr. 91).

When Claimant worked offshore he usually worked seven days on and seven days off. Sometimes he worked fourteen and fourteen. Prior to the injury, during his time off Claimant was enrolled in welding school. If he was not at welding school, he would work with a friend who owned his own business. His friend owned a "building, fabricating" business. Claimant would work Monday through Friday with his friend on the days he was home from offshore work, but it was not a set schedule. (Tr. 91-92).

Since his injury, Claimant uses a heating pad with which Yolanda must render assistance. As for Claimant's shoes, Yolanda must continuously tie the laces because they come loose. Although he has a device which helps him tie his shoes, "[h]e can't put them around the lace, the laces, and he can't hold it, like, you know, I have to tighten it." Furthermore, she helps Claimant take off the brace during the day when it starts burning his foot and then she puts the brace back on. The burning is not something that happens daily. She does not have to reposition the brace during the day because "his foot fits right in it." Claimant does not sleep with the brace on his leg. If he takes a nap, she will remove the brace for him. Claimant does not sleep with his clothes on, just his underwear and naps in his bed. In order for Claimant to take a nap, she must help him get undressed and when he wakes, she helps him get dressed again. (Tr. 92-94).

Everything Yolanda does to help Claimant get ready in the morning is done in reverse at night to get him ready for bed. Claimant takes a second shower in the evening. (Tr. 94-95).

Claimant suffers from skin "sensations from his allergies." "There's just this one spot that he keeps itching and he can't scratch it . . . arm won't go back and this one he can't use so I have to scratch him. . . . Or the back of his neck." Claimant

began having problems itching right after his accident, while in the hospital. (Tr. 94-96).

Claimant has a device for his right hand. He uses this device at night, every night. He also has one that he wears during the day, but does not use it everyday. Yolanda puts this device on him every night. (Tr. 95-96).

Yolanda testified the last time Claimant fell was about one month ago and Claimant still has a scar from it on his lower, middle back. The last fall occurred outside, while she was not with him, but "a friend of ours [who] was out there and . . . ran to catch [Claimant]." (Tr. 96-97).

Claimant's mother also helps care for Claimant. Although Claimant's mother only gets paid for six hours on Saturday and Sunday, she comes by during the week when needed or when Yolanda needs to go someplace. Yolanda always tries to make sure there is somebody around to help Claimant. By "around," she means on standby and accessible. (Tr. 97-98).

Besides Claimant's mother, Yolanda also tries to have Claimant's father, sister or brother around to help Claimant when needed. She denied ever leaving her two children alone with Claimant without there being someone else around "on standby." Claimant's brother farms, so there are times where he is in the field and not accessible. As for Claimant's father, he is always at home and available. (Tr. 98-99).

On cross-examination, Yolanda clarified that she left her job because "the office" was slow at the time. She does not consider it a lay off, but there would have been a lay off had she not left. She admitted she drew unemployment benefits and was mistaken when she testified earlier that she did not. (Tr. 100).

Yolanda acknowledged several periods of separation, none lasting more than three days. She admitted to "two, three, no more than five" separations. During these separation periods, she continued to get paid as Claimant's caretaker. When she was gone, Claimant's mother and brother stayed with and cared for Claimant. (Tr. 101).

Yolanda conceded she gets paid for six hours a day for five days a week at a rate of \$10.90 per hour to care for Claimant. This amount totals \$327.00 per week. There are no taxes deducted from this amount. She does not work in any other

capacity. In addition to caring for Claimant, she is a stay-at-home mother. She admitted that while she helps Claimant get ready in the morning, she also helps her kids get ready for school and is not standing over Claimant every moment. "When he's eating I'll go start getting [the kids] dressed." (Tr. 101-102).

Yolanda does all the cooking which she did prior to Claimant's injury. When she cooks for Claimant, she is also cooking for their children. She goes to the store for Claimant if he needs something, but prior to his injury Claimant went to the store himself. Now, if he needs anything, she must go to the store for him. (Tr. 102).

She testified Claimant drove prior to the accident, but since the accident has "a little Cushman (phonetic) that he drives around." She first denied that Claimant drove at all. She then admitted that the only motor vehicle he has driven has been "[f]rom our house to his mom's house which is, we live in the country and it's probably about a quarter of a mile maybe from our house to her house, he'll drive." Sometimes, he even takes the children with him, but mostly he goes by himself. He does not do this frequently. (Tr. 103).

Prior to Claimant's injury, their oldest daughter was in daycare. On cross-examination, Yolanda testified her three year old daughter currently goes to preschool. She then testified, however, that she is a stay-at-home mom. Yolanda admitted she would put the children back in daycare if she were to go back to work full-time. (Tr. 104).

She admitted Employer paid Claimant \$100,000.00 for Claimant to have a handicap accessible house. Claimant built a new home with this money. (Tr. 104).

Yolanda does not stretch or apply a liniment or oil to Claimant on a daily basis and Claimant's bladder and bowel problems are not everyday events. In fact, she testified Claimant can go a month without having an accident. Claimant has had the "start" of an accident in bed, but "not actually have one." She acknowledged she would not have to change the sheets if Claimant wore a diaper. (Tr. 104-105).

Yolanda admitted leaving Claimant alone, but always had someone on "standby." "Standby" means "if he needs something he'll call me." She would "always call to make sure someone is going to be on the other end." When she left the home because

of a "separation," she "knew his mom was going to stay with him" and another time, Claimant actually went and stayed with his mother. Basically, "on standby" means having someone know Claimant is home by himself. "Standby" does not mean someone comes over and sits with him unless Claimant is sick or calls someone to come over. (Tr. 105-106).

She recalled Claimant was advised by Dr. Leglue not to weld, woodwork, or drive a tractor because they were dangerous activities. When Claimant drove the tractor, he struck their dog because he was unable to stop the tractor. (Tr. 107-108).

When Claimant's friends, father, or brother come over to help him, they are not compensated for their time. They come when Claimant needs help and help Claimant out of love, compassion or friendship. (Tr. 108).

Yolanda prepares Claimant's medication for "the week." It takes her about 15 - 20 minutes to prepare his medications. The medication is placed in a container that Claimant can open. Once she arranges his daily consumption of medication, Claimant can get to and take the medication himself. (Tr. 108-109).

On re-direct examination, Yolanda testified Claimant saw a Dr. Lindemann at the request of the insurance company. Claimant went to Lafayette for his examination by Dr. Lindemann. Claimant's mother took him to that appointment and Yolanda was not present. (Tr. 109).

In Yolanda's absence, she admitted Claimant needs help eating and "stretching, if he's hurting." He may also need some ointment and if "he takes a nap to get in and out of bed" and dressed. In addition, she helps in case of bladder or bowel problems. (Tr. 111).

Prior to Claimant's injury, Yolanda earned \$2,300 per month "plus bonuses and hospitalization." She no longer has "hospitalization" for either the kids or herself. (Tr. 112).

She admitted she is sometimes still in the house when Claimant's mother comes over on the weekends to assist Claimant. Claimant's mother gets paid six hours a day for two days, which does not include time spent with Claimant by Claimant's mother during the week. When she and Claimant separated, Claimant's mother and brother came by the house and stayed with him. They stayed with Claimant the whole time, including overnight. (Tr. 112-114).

MARY JO FERGUSON

Mary Jo Ferguson ("Mrs. Ferguson"), Claimant's mother, works for F.A. Richard and Associations ("FARA") and Avoyelles Parish School Board, as a teacher's aide. She returned to work at Avoyelles on August 12, 2004. She works there from 8:00 a.m. until 3:30 p.m. She gets off from work on the same holidays as the children. She also works for FARA about twelve hours per week. She mostly works for FARA on the weekends, but sometimes works for them during the week as well. (Tr. 115-116).

She gets paid to help Claimant get out of bed on weekend mornings. She stated Claimant sometimes needs his arms stretched. She then waits while Claimant showers, making sure he does not need anything while he is in the shower. She also helps Claimant get dressed. Then they have breakfast together. After she helps him get ready in the morning, "then we do more or less what he wants to do that day." Claimant cannot "do buttons," "belts," "needs help with his shoelaces," his brace and some of his shirts. Specifically, some days Claimant is unable to lift his arm high enough to get it into the sleeve of his shirt. Claimant mostly wears T-shirts. (Tr. 116-117).

Claimant wears a brace on his right leg, called an AFO, which helps him walk. Claimant is sometimes able to put the brace on himself and "[o]nce in a while he'll need help with it." He needs help with the "strap, where it fastens it on." (Tr. 117).

Mrs. Ferguson also helps Claimant with bowel and bladder accidents. When Claimant has an accident, she has to help him into the shower and "hose him off" with the showerhead. She also helps him dry his clothes, changes the bed, washes the sheets, and anything else that was soiled. (Tr. 117-118).

She testified she helps him with his outdoor projects. Claimant likes to weld and cut grass on his tractor. "He likes to tinker motors, little motors, like an air compressor, trying to - he likes to build things." She helps him with anything he needs "two hands with." When Claimant works on one of his projects, Mrs. Ferguson is by his side the entire time. (Tr. 119).

She provides Claimant with transportation when he needs to go into town. She does not just give Claimant rides on the weekend, she does it anytime he needs something and she is home.

Before Yolanda began taking Claimant to his therapy sessions, Mrs. Ferguson took him. She stayed with Claimant for four months when he was in the hospital in New Orleans, Louisiana. After Claimant came home, she stayed with him until she went back to work in August, "that was my job; I was with him just about constantly." (Tr. 119-120).

She confirmed that Yolanda calls her when she goes anywhere. The purpose of these calls is to get her to stay with Claimant while Yolanda goes out. Claimant does not go out to eat. He does not go anywhere and Mrs. Ferguson will stay with him so he is not alone. (Tr. 120).

Claimant's father does not work and stays at home because he is disabled. He helps Claimant if Mrs. Ferguson is not there and Yolanda has to go into town. They always try to make sure someone is at home for Claimant. "If [she is] not there, or he's just there, Leo's sister would be there or his sister-in-law. We all live about a quarter of a mile away." (Tr. 120-121).

Claimant's brother, Leon Ferguson, also helps care for Claimant. Leon helps Claimant with "[a]nything and [e]verything" including helping him outside with his projects to cleaning up the floor and Claimant when Claimant has an accident. (Tr. 121).

Claimant uses "Blue Emu Oil" for his muscle pain. The oil gets rubbed onto Claimant when he is stiff. Claimant has on and off days, but sometimes he is almost immobile due to muscle stiffness. When she rubs him, she can feel lumps and can feel him "knot up." (Tr. 121-122).

On several occasions, she helped pick Claimant up off the floor after he has fallen. She has seen him fall "many times." (Tr. 122).

She acknowledged Claimant gets "botox shots to try to help with the muscle pain" and allergy shots. She testified her daughter, a nurse and Claimant's sister, usually gives Claimant his shots at his home. She did not know whether Yolanda assists Claimant's sister with the shots. (Tr. 122-123).

She admitted Claimant and Yolanda previously separated. She further admitted she and the rest of her family took care of Claimant during the separations. She went to Claimant's house and stayed with him. Claimant has also stayed at his mother's

house. During one of the separations, Leon stayed with Claimant. There was never a time when Claimant was left alone. (Tr. 123-124).

She tries to stay longer, about 10 to 12 hours, on Saturdays because Claimant does not believe in working on Sunday. She has also stayed the night. Claimant does not even work on his projects on Sunday. (Tr. 124).

On cross-examination, she admitted Claimant burned himself several times while welding. There was also an instance where Claimant ran over the family dog while operating a tractor. (Tr. 125).

There are times where Yolanda needs to get out of the house for a while. During these times Mrs. Ferguson sometimes watches the children. The children, however, are sometimes at their other grandmother's house. "If they're there I'll watch them." There are times when she sees her grandchildren when she is caring for Claimant. (Tr. 125).

Although Claimant has been left alone, there was always "somebody at one of our houses, if I'm not there his sister-in-law might be home. Yolanda usually calls; 'You're going to be home? Somebody going to be around? I'm going such and such a place.'" She is not always home, but when she is home she goes over to Claimant's house. She admitted there are times when Claimant has been left by himself, but not for any "long amounts of time." However, she denied anytime where Claimant was left alone with his kids at home. (Tr. 126).

ROSS MCBRYDE

Ross McBryde works for FARA as the Director of Program Management. He became the Director of Program Management on June 1, 2003. Prior to June 1, 2003, Mr. McBryde worked for FARA as a program manager, managing Employer's program. As Employer's program manager, he managed their accounts. He had an adjuster and a medical case manager working with him on the account and he personally handled the more "serious cases." (Tr. 129).

Claimant's injury qualifies as one of "the more serious cases." Claimant's claim was administered under the Act. Mr. McBryde worked for Ingalls Shipbuilding for ten years as an adjuster, supervisor, and assistant for claims under the Act. (Tr. 129-130).

As of the Friday prior to the formal hearing, Claimant received \$152,153.09 in indemnity benefits and \$582,655.20 in medical benefits. Regarding his indemnity benefits, Claimant receives \$691.00 per week as permanent and total disability benefits. Claimant received a few cost-of-living increases. (Tr. 130-132).

Before Mr. McBryde worked on Claimant's file, the records indicate Employer paid Claimant \$100,000.00 for modifications to make his home handicap accessible. Mr. McBryde determined the amounts Mary Jo and Yolanda Ferguson would be paid for taking care of Claimant after these modifications were completed.

Well, the way I arrived at it is his doctor said he had reached maximum medical improvement and indicated that he would need some home health aid, so I retained the services of an occupational therapist and had them go to his house and spend the day with Mr. Ferguson to go through his activities of daily living to determine what he could and couldn't do for himself. And, then I forwarded that report from the occupational therapist to his physician, Dr. Gerald Leglue, and Dr. Leglue gave me the opinion that he would require four hours of care per day, seven days a week.

The occupational therapist, Ms. Klusman, was the first step in Mr. McBryde's process of determining the amount of time Claimant needs home healthcare assistance. The occupational therapist reported Claimant did not need 24-hour a day assistance. (Tr. 136-138).

After Mr. McBryde presented Ms. Klusman's report to Dr. Leglue, Claimant's treating physician, he responded that Claimant needed four hours of care seven days a week. Mary Jo and Yolanda Ferguson provide Claimant with this care. Dr. Leglue indicated it was up to Claimant's family members to determine whether they want to participate in his care. (Tr. 138-139).

Once Dr. Leglue provided his opinion, Mr. McBryde "did some research to see how much a nurse's aide would be paid per hour," and determined they are paid \$10.90 per hour. Therefore, Mr. McBryde concluded four hours per day, seven days a week, at a rate of \$10.90 was reasonable and necessary for Claimant. This

totals \$305.20 per week. Claimant was not happy when he was advised Employer was only providing caregiving for four hours per week, stating it was not sufficient to meet his needs. Claimant expressed his displeasure with Mr. McBryde's decision and sent a letter with a list of his scheduled daily activities and "we attempted to strike a compromise with him on that issue." (Tr. 139-140).

Shortly after his first opinion, Dr. Leglue rendered an amended opinion to Mr. McBryde stating Claimant needed more care than four hours a day. Since Dr. Leglue changed his opinion, Mr. McBryde sought a second opinion from Dr. Lindemann, a physiatrist, who provided that four hours a day was sufficient caregiving for Claimant. Dr. Lindemann also indicated Claimant needed somebody to drive him to and from his therapy appointments. Therefore, Employer provided an additional two hours of caregiving to Claimant to "include the time that your wife transports you back and forth from therapy, as well as the other activities that she has to help him with." (Tr. 140-141).

Dr. Lindemann opined Claimant's activities, of welding, woodworking or driving a tractor, were not safe considering Claimant's impairment. Mr. McBryde testified Dr. Leglue modified his opinion to include additional supervision during such activities. Mr. McBryde admitted it was a difficult decision, but "you have the fine line of what's a labor of love or friendship and what is medically necessary." Based on Dr. Lindemann and Dr. Leglue's opinions, Mr. McBryde determined "six hours seemed fair based on the medical records that we had." Originally, Yolanda Ferguson was paid for all seven days, then she contacted Mr. McBryde and requested she get paid for five days at six hours per day and Mary Jo Ferguson get the remaining twelve hours on the weekends. (Tr. 141-142).

Before Claimant left the hospital, the issue of necessary modifications to his home came up and Claimant discussed the necessity with a nurse from FARA. FARA paid Claimant \$100,000.00 to make any necessary adjustments to his home. Although this was not an unconditional payment, Employer classified the payment as Claimant's housing needs under medical payments. Mr. McBryde believes Employer waived any right to overpayment regarding the cost of the handicap modifications to Claimant's home. (Tr. 144-148).

Mr. McBryde received a copy of Dr. Leglue's May 7, 2003 report, which provided "[i]n addition to the hands-on assistance in the morning and the evening he needed somebody to be on

standby assistance for the various things that came up during the day." Therefore, Mr. McBryde requested a second opinion from Dr. Lindemann. Mr. McBryde recalled Dr. Lindemann opined Claimant should not weld, woodwork, or drive a tractor because these activities were not safe for him to do. Mr. McBryde did not receive a copy or summary of Dr. Lindemann's deposition, but he did receive a copy of his medical report. (Tr. 148-150).

Dr. Lindemann's report suggested that as an alternative to having someone on standby, Claimant should be given a cell phone or walkie-talkie to call for assistance. Dr. Lindemann did not provide for who would be on the other end of the cell phone or walkie-talkie. Mr. McBryde did not recall reading in Dr. Lindemann's report that Claimant could call "9-1-1" when he had an accident or had fallen in his house. He did consider it to be a reasonable alternative if it was "an emergency." Mr. McBryde testified it would be an emergency if Claimant fell and could not get up. (Tr. 150).

On re-direct examination, Mr. McBryde acknowledged Claimant has a cell phone as suggested by Dr. Lindemann. Mr. McBryde testified the six hours Employer pays Claimant's wife and mother for caregiving includes instances where Claimant has fallen. (Tr. 152).

Mr. McBryde agreed with Dr. Lindemann's opinion about the unreasonableness of Claimant's activities since Claimant was burned while welding and ran over his dog while operating a tractor. The activities are dangerous, "particularly when you have an impairment, and you may not be able to fully operate a vehicle or you may not be able to feel the heat and burn yourself." Claimant already sustained a fairly serious burn while welding. (Tr. 153).

Dr. Leglue's May 7, 2003 report, stated in pertinent part: "[a] little hands-on time maybe [sic] approximately six hours a day, the time frame that he requires that assistance is unpredictable and unreliable." Mr. McBryde interpreted Dr. Leglue's opinion to mean Claimant needed a caregiver for a total of six hours per day. Employer has no problem paying for this time, but is not willing to pay for "standby time" of a love one or family member who just sits around doing nothing. (Tr. 153-154).

On re-cross examination, Mr. McBryde admitted Dr. Lindemann advised a necessity for caregiving two hours in the morning and two hours in the evening. Mr. McBryde acknowledged his "logic

behind the additional two [hours] was transportation time to and from therapy, and to help for other little instances that he may need help." Claimant does not have therapy everyday. Although there is no additional payment for the caregiver to take Claimant to Lafayette, Alexandria or Marksville, the transportation time is included in the six hours of caregiving for which Employer already pays. (Tr. 155-156).

The Medical Evidence

GERALD J. LEGLUE, JR., M.D.

Dr. Leglue, Claimant's treating physician, rendered a May 7, 2003 report, which was submitted into evidence as CX-1. Dr. Leglue is a physical medicine and rehabilitation physician. He conducted a follow-up visit with Claimant on May 6, 2003, which revealed that Claimant's wife "is being allowed six hours a day officially to assist him with all activities including ADL's and self care as well as community outings." While Claimant functions "reasonably well," Dr. Leglue opined Claimant requires assistance "at any given time, especially at nighttime with regards to bathroom privileges and transfers." (CX-1, p. 1).

Dr. Leglue specifically stated "[a]llthough hands-on time may be approximately six hours a day, the time frame that he requires assistance is unpredictable and unreliable." Claimant's needs are unpredictable because at nighttime he may need assistance going to the bathroom or with other safety issues. Dr. Leglue compared Claimant's needs to "a fireman who is on call 24 hours a day but may only be needed for a short amount of that time." Dr. Leglue stated Claimant needs both supervision and hands-on assistance for basic transfers, especially at night for bathroom privileges. (CX-1, p. 1).

Dr. Leglue also discussed Claimant's hobbies around the house including lawn care and other light activities in Claimant's "shop." Claimant "does need supervision constantly during these activities for both safety and assistance if he were to fall and have difficulty getting up." Dr. Leglue opined he felt "this is medically necessary both physically and psychologically and this is lifelong in nature." (CX-1, p. 1).

On June 24, 2003, during a follow-up visit with Dr. Leglue, Claimant reported feeling "fatigued beyond his normal state for unknown reasons." Claimant denied any other symptoms. (CX-5, p. 19).

On December 8, 2003, Dr. Leglue saw Claimant for a follow-up visit. Claimant complained of GI symptoms including both diarrhea and constipation, but denied any melena or bright red blood. Claimant asked Dr. Leglue whether modifications to his AFO were possible so he may ascend and descend inclines and stairs more comfortably. Dr. Leglue advised Claimant he would discuss the matter with Claimant's orthotist. As to Claimant's sexual dysfunction, Dr. Leglue recommended Levitra since Claimant had a poor response to Viagra. Claimant and Dr. Leglue also discussed Botox injections to Claimant's right arm for tone reduction. (CX-5, p. 18).

MICHAEL L. DRERUP, M.D.

Dr. Leglue referred Claimant, after his MRI of the cervical spine, to Dr. Drerup, a neurologist, to discuss Claimant's complaints of pain. Review of the MRI of the lumbar spine demonstrated fusion. There was also evidence of "encephalomalacia just superior to the C5-6 level within the cervical cord proper." Dr. Drerup treated Claimant's traumatic residuals in 2001. (CX-2, pp. 1, 5).

On August 20, 2001, Dr. Drerup diagnosed Claimant as

1. Status post cervical spine fracture, C5-6, with cord contusion and resulting encephalomalacia.
2. Right hemiparesis secondary to #1.
3. Chronic but intermittent interscapular pain, right, without evidence of cervical radiculopathy by history.

(CX-2, p. 1).

As of August 20, 2001, Claimant denied bowel or bladder incontinence, but stated he suffered from a weak bladder and bowel since his injury and reported symptoms of urgency. Claimant also reported instances of clumsiness and difficulty waking. Claimant must use his AFO and cane. Claimant complained of frequent headaches, dizzy spells, nasal congestion/sneezing, sinus trouble, hay fever and neck pains or lumps, as well as "memory problems, cry often/depressed, worry a lot, numbness or tingling, weakness," as well as aching muscles and joints. Claimant advised Dr. Drerup of his medications - Baclofen, Celebrex, Neurontin, Celexa, Darvocet, and Theravax. (CX-2, p. 2).

Physical examination revealed Claimant was able to stand erect with the assistance of the AFO and cane. He could also walk with the assistance of the cane and AFO on the right foot and leg with obvious difficulties. When the AFO was removed, Claimant walked with significant foot drop and steppage gait. A visual inspection of Claimant's "lower extremities shows obvious atrophy of the right lower extremity as compared to the left." "Visual inspection of the upper extremities showed atrophy of the musculature of the right hand and forearm" compared to the left. In addition, motor tone was diminished in the right upper extremity and lower extremity. (CX-2, pp. 3-4).

The record is devoid of any later or additional medical reports or opinions from Dr. Drerup.

DARLA J. GILBERT, Ph.D., L.P.C.

Dr. Gilbert provided therapy for Claimant's depression following his work-related injury. Claimant suffered severe major depression due to his physical limitations and chronic pain. Dr. Gilbert, as part of Claimant's treatment, has "encouraged him to pursue hobbies and adapt his interests to his physical abilities." Dr. Gilbert opined Claimant's physical activity has "greatly improved [Claimant's] mental health." "Although he requires considerable help to participate in his hobbies, he has found that this involvement provides motivation, interest, and encouragement for his new limited lifestyle. Without these activities, I am concerned that [Claimant] would regress considerably, both mentally and physically." (CX-3, p. 1).

MARK K. ROSENBLOOM, M.D.

The record reflects reports and opinions of Dr. Rosenbloom, from March 2001. No later opinions were proffered.

In March 2001, Dr. Rosenbloom, a "Diplomate of the American Board of Physical Medicine and Rehabilitation," re-evaluated Claimant and provided "information towards the development of a life care plan." Dr. Rosenbloom obtained patient information from Claimant and his medical records. Claimant advised Dr. Rosenbloom that his "strength has not improved drastically since discharge [October 29, 2000], but he continues to work on maintaining range of motion and improving his function and endurance." (CX-4, pp. 1- 2).

When discharged from the rehabilitation center, on October 20, 2000, Claimant required "standby assistance with standing; was able to ambulate 500 feet with standby assistance . . . was able to dress upper extremity with independence and minimal assistance for lower extremity dressing; was able to bath with standby assistance and toileting was independent, but toilet transfers were standby assistance." As of March 8, 2001, Claimant had "similar functional status and does get around the house independently with his wheelchair" and could ambulate with someone nearby. (CX-4, p. 2).

Since discharged from Touro Rehabilitation Center, Claimant developed depression. Claimant took Celexa for the depression. Claimant usually controls his bladder without specific medications, but has an accident about once a month. Claimant was diagnosed by a urologist with bladder dysenergias. He also has sexual dysfunction. (CX-4, p. 2).

Dr. Rosenbloom reported Claimant received outpatient physical therapy, occupational therapy and pool therapy. Claimant's right lower extremity was weaker than the left including spasticity. Claimant ambulated with "a straight cane on the left upper extremity." Claimant "also has neuropathic pain involving primarily the right side for which he is taking Neurontin." (CX-4, p. 2).

Claimant's right lower extremity weakness included weakness at all muscle levels. His weakness in the left side was not very severe. Claimant required an articular AFO on the right ankle for ambulation and used a right resting hand splint. Claimant was diagnosed with right shoulder adhesive capsulitis for which he received therapy. (CX-4, pp. 2-3).

According to Dr. Rosenbloom, Claimant occasionally fell due to loss of balance, but does not fall frequently. At the time of their appointment, Claimant last fell about one month before. (CX-4, pp. 2-3).

Dr. Rosenbloom's impression of Claimant was "status post C5-6 incomplete spinal cord injury with preserved motor and sensory function in the upper and lower extremities with continued requirements for supervision or assistance for some ADL's and ambulation due to continued weakness." Claimant continued to have a neurogenic bowel, but this problem was well-managed through his bowel program. In addition, Claimant's neurogenic bowel was "fairly well balanced at the present time." (CX-4, p. 5).

Dr. Rosenbloom had several lifecare recommendations for Claimant, both from a rehabilitative and a medical point of view, which Claimant would require if "various complications develop as a result of the spinal cord injury." These recommendations included rehabilitation interventions, possible complications, environmental needs, equipment, medications and a whole body impairment rating. (CX-4, p. 5-9).

As to Claimant's potential rehabilitation interventions, Dr. Rosenbloom opined Claimant "will need various rehabilitation interventions periodically throughout his life." He believed Claimant required physical and occupational re-evaluations about five times every two or three years. (CX-4, p. 5).

Claimant would also require vocational rehabilitation and a job coach. This would be an "ongoing process until job placement has been found to be stable." Dr. Rosenbloom opined Claimant needed a recreational therapist every two or three years for fifteen years to re-assess the patient's current leisure and recreational abilities and desires. Claimant would likely require psychology services because depression was relatively frequent after spinal cord injuries, with a 40 - 60% chance of developing depression at least once in his lifetime due to the spinal cord injury. If psychological treatment became necessary, Claimant would need about seven to ten sessions every three to five years. A psychiatrist may also be needed if medication management was necessary for Claimant's depression. (CX-4, p. 6).

Dr. Rosenbloom reported Claimant needed a membership to a fitness center, between and during physical therapy interventions, in order to maintain the level of physical strength and flexibility needed to continue an independent level as was possible due to Claimant's spinal cord injury. Claimant would periodically need a social worker to assess his home life and his ability to interact in the community. A social worker would be needed on an average of once every one or two years for about three sessions each time. (CX-4, p. 6).

Dr. Rosenbloom next discussed possible complications Claimant may experience. Claimant was at a "high risk of falls, which could result in fractures, new neurological injury such as brain injury, etc." If Claimant developed dysphagia, he could require interventions from a home health nurse or respiratory therapist about two to three times per week. (CX-4, p. 6).

Dr. Rosenbloom acknowledged Claimant had the support of family who were able to provide supervision 24 hours per day.

However, the presence of family or friends is not always guaranteed, and if this is the case, the patient still may require 24-hour supervision although his level of independence may improve in the future. However, whether this will occur or not cannot be predicated after an incomplete spinal cord injury. According to my present prediction, I believe he has a 50 - 60% chance of requiring 24 hour supervision for the remainder of his life, especially regarding mobility [through] the house as is currently present. If no other significant complications occur this would require a sitter. If his physical and mental abilities decline in the future as a result of complications as mentioned above, then a certified nurses' aid or LPN could be required. The LPN would not be needed continuously, but two or three times per week.

(CX-4, pp. 6-7).

As of March 8, 2001, Claimant was at risk for "recurrent urinary tract infections and bladder dysfunction." This required treatment with a urologist "for long-term follow-up, at least once per year, and possibly more frequently if complications occur." (CX-4, p. 7).

Dr. Rosenbloom recommended routine follow-up with a primary care physician at least once per year or as needed "in order to ensure the maintenance of the patient's overall health which is at an increased risk of complications due to a spinal cord injury such as pneumonia and urinary tract infection." If Claimant continued to have significant weakness, as he gets older, his risks would increase. Dr. Rosenbloom further recommended Claimant receive routine follow up by a physical medicine and rehabilitation specialist at least once per year or as needed. (CX-4, p. 7).

Claimant's "home needs to be accessible for him in order to ensure continued safety and allow him to engage in any home activity that he desires." Dr. Rosenbloom opined "[s]uch

accessibility would help prevent depression." Necessary changes included increasing the width and size of doorways, building ramps, an accessible shower or tub, wheelchair accessible sinks, accessible storage areas in the kitchen and bathroom, a raised toilet and a portable ramp. (CX-4, p. 8).

As to equipment, throughout his lifetime, Claimant will likely need "self-care and ambulatory equipment such as a manual wheelchair, wheelchair cushion, lower and upper extremity orthotics such as an AFO, and an assistive device such as a cane or walker." The assistive devices and wheelchair need replacement about once every three to five years. (CX-4, p. 8).

Dr. Rosenbloom determined Claimant's whole body impairment rating as 65% using The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. The breakdown of his determination included: "4% impairment for neurologic anal/rectal impairment; 12% neurological sexual impairment; 6% neurological impairment of the bladder; 40% impairment of two upper extremities; 27% impairment due to station and gait disorders." (CX-4, p. 9).

LUIS E. ALVAREZ, M.D.

On January 27, 2004, Dr. Alvarez, a gastroenterologist, treated Claimant primarily for constipation. Dr. Alvarez obtained Claimant's past medical history from Claimant's wife. During his examination, Claimant "related bowel habits alternating between constipation and diarrhea with associated lower abdominal pain." Dr. Alvarez opined Claimant's lower abdominal pain could be the result of irritable bowel syndrome, diverticular disease, polyps or secondary to his medications. He also concluded Claimant's alternating bowel habits were the result of irritable bowel syndrome, polyps or medication induced. (CX-5, pp. 2, 16).

WAYNE T. LINDEMANN, M.D.

The parties deposed Dr. Lindemann, a board-certified physical medicine and rehabilitation physician, on May 20, 2004. (EX-2). His medical records were introduced into evidence as EX-1.

Dr. Lindemann has been practicing medicine in Lafayette for nine years. He spends a majority of his practice doing rehabilitation. He is the medical director of an acute care rehabilitation unit and the medical director of a long-term

acute care facility. Dr. Lindemann spends the majority of his time within patient practice at the hospital. His patients include a combination of primarily strokes, spinal cord injuries and orthopedic rehabilitation, as well as amputees, brain injuries, etc. Dr. Lindemann works with physical therapists and occupational therapists on a daily basis. He conducts second opinion medical evaluations on a routine basis, mostly for defense attorneys. (EX-2, pp. 6-9).

There are several factors Dr. Lindemann considers important in assessing home health care needs. The first, cognitive ability, requires a determination of whether it is safe for Claimant to be left alone, whether his judgment is impaired, whether he is able to communicate his needs, whether he is able to dress and bathe himself, equipment needs and whether he gets around by wheelchair or by ambulation. (EX-2, p. 12).

As for Claimant, Dr. Lindemann looked primarily at his functional ability - what Claimant was capable of doing by himself and what he needed help with. Dr. Lindemann looked at Claimant's functional ability by reviewing medical records from Dr. Rosenbloom and Dr. Leglue and by doing a physical examination. Dr. Lindemann did not speak with Claimant's family, but did conduct an interview with Claimant. (EX-2, pp. 11-12).

On July 1, 2002, Dr. Lindemann examined Claimant pursuant to FARA's request for a Second Medical Opinion. Dr. Lindemann reviewed Claimant's medical records prior to their appointment. Claimant "gained significant function postoperatively, compared to his preoperative function[,] but still had right sided hemiparesis and required the aide of a cane and AFO on the right foot. Claimant did not drive a motor vehicle, but drove his tractor in his yard. He received massage therapy for his right shoulder three times a week and had a personal trainer one and one-half hours four times a week for basic exercises, stretching, and basic maintenance. (EX-1, p. 1).

Claimant advised Dr. Lindemann that his wife brought him to massage therapy about 37 miles from his home and to his personal trainer which is 12 miles away. Claimant was treated once a month by Dr. Leglue for rehabilitation and Dr. Gilbert for psychological issues. (EX-1, p. 1).

Claimant's bowel and bladder remained incontinence and he will "often wet the bed, pretty regularly at night but states that he is okay during the day time." "He uses a Theravac enema

at night and has maintained good bowel control with few accidents." (EX-1, p. 2).

Dr. Lindemann reported Claimant had "a great deal of equipment including a wheelchair, right hand splint, right AFO with hinge, left single cane, shower bench, grab bars in the shower and a new house has actually been built for him with wide doors and a three inch step." (EX-1, p. 2).

Claimant's wife helps him get out of bed and into the shower, dressed and dried in the morning. His wife assists him about 50% of the time. She also helps him with his breakfast, but Claimant admitted he cooked very little prior to his injury. Claimant can prepare simple meals on his own. Dr. Lindemann opined Claimant was "basically modified independent at home." Claimant showers at night with assistance from his wife, then she helps him get into bed. (EX-1, p. 2; EX-2, pp. 15-16).

A "modified independent" means Claimant is "basically independent with the use of an ambulatory device, such as a brace, which he is independent with the use of those items. He required a cane and a brace to walk." (EX-2, p. 16).

A physical examination of Claimant revealed he was in "no acute distress" and was able to ambulate with a left single cane with a right hinged ankle-foot orthosis. There was increased tone localized to the right elbow, wrist, and leg, as well as decreased range of motion. (EX-1, pp. 2-3).

Dr. Lindemann opined Claimant required caregiver assistance with activities of daily living for two hours in the morning and two hours in the evening. Assistance with Claimant's daily activities includes bathing, dressing, and assistance with a bowel and bladder program. Dr. Lindemann concluded Claimant could prepare simple meals on his own, but activities such as welding or woodworking posed safety concerns to Claimant. Dr. Lindemann rejected any need for 24-hour assistance. Instead, he recommended Claimant get a cell phone or walkie-talkie type system which would allow him to call for help if needed. Dr. Lindemann opined the massage therapy was only needed short term, but Claimant should continue with his personal trainer two to three times a week. (EX-1, pp. 3-4; EX-2, pp. 14-15).

By using the word "caregiver" Dr. Lindemann did not mean licensed nurse. He considers a relative or friend - anyone who could assist with Claimant's activities - to be a caregiver. Dr. Lindemann did not think Claimant needs 24-hour assistance

because Claimant was "able to pretty much take care of himself. He walked around the office with a cane and a brace on the ankle, he admits to welding, performing yard work, woodworking." (EX-2, p. 15).

Dr. Lindemann recommended "transportation should be provided to [Claimant] to get him to and from his personal trainer, massage therapy as well as physician appointments." (EX-1, p. 4).

Dr. Lindemann concluded Claimant could be independent at nighttime. In determining the number of hours Claimant needs a caregiver, Dr. Lindemann included safety concerns and not just Claimant's bladder, bowel, bathing, and dressing problems. (EX-2, pp. 16-17).

On cross-examination, Dr. Lindemann reiterated the caregiver assistance he recommended of two hours in the morning and two hours in the evening, related to Claimant's need for assistance in bathing, dressing, and his bowel and bladder problems. Dr. Lindemann was not sure whether Claimant was able to take the AFO off himself. Although Claimant had no use of his right arm, Dr. Lindemann responded Claimant had complete use of his left arm and that "there are many quadriplegics who live alone and do just fine." (EX-2, pp. 17-19).

Dr. Lindemann opined Claimant, instead of having 24-hour assistance, should have a cell phone or walkie-talkie to call someone if he needs help throughout the day. When asked who would be on the other end of the walkie-talkie or cell phone, Dr. Lindemann responded "[t]here are things, such as a medic alert button, which may be a possibility for him" and Bunkie has a "medic alert-type system." When asked whether he knew if Bunkie had a medic alert system, Dr. Lindemann responded "If he called 911, I would think somebody would answer." Just as Dr. Lindemann recommended to his 84-year old patient with a broken hip trying to live independently, Claimant should call a fire truck with paramedics and an ambulance if he falls or needs assistance with his bowel or bladder problems during the day. (EX-2, pp. 19-20).

Although, Dr. Lindemann suggested Claimant would "benefit from a driving evaluation at a later date," as of July 2, 2002, he did not think Claimant should be operating his tractor. Claimant needs a driving evaluation to see whether he was capable of driving. Claimant's treating physician would perform or order the evaluation. (EX-2, pp. 20-21).

During his evaluation, Claimant admitted he drove his tractor around the yard. Dr. Lindemann opined "he's fairly independent driving a tractor." Dr. Lindemann would not equate driving a tractor to driving a vehicle on a roadway, however, concluded if Claimant was capable of driving a tractor, he may be capable of driving a car. Claimant did not explain to Dr. Lindemann how he managed to drive the tractor. (EX-2, pp. 21-22).

Because Claimant woodworked and welded, Dr. Lindemann deduced Claimant "was capable of doing a great number of things independently." Claimant did not inform Dr. Lindemann as to how he managed to woodwork or weld, but "he apparently did it independently." By "independently," Dr. Lindemann means "by himself." Claimant did not maintain any need for help and admitted using welding tools at home and riding his tractor. Dr. Lindemann explained he "can only go by what [Claimant] told me." "When somebody tells you they're welding at home and driving a tractor, I would assume that they're doing it themselves." Dr. Lindemann's conclusions were based on Claimant's statements that he was driving a tractor and woodworking. (EX. 2, pp. 21-23).

Dr. Lindemann acknowledged Claimant did not have complete control over his bowel and bladder. He was aware Claimant had accidents at night where he soiled himself in bed due to these problems and his inability to get to the bathroom quickly enough. Dr. Lindemann "understand[s] that he needs somebody in the morning in case he has an accident at night." Dr. Lindemann does not support 24-hour caregiver assistance just because Claimant may soil himself during the night. When asked what Claimant should do in the evening after an accident in bed, Dr. Lindemann answered "a foley catheter may be considered with a leg bag, or further urologic testing" or a "suprapubic catheter." Dr. Lindemann opined these would take care of Claimant's bladder problem and Claimant's bowel program will take care of his bowel problems. "At this time, he should wear a diaper or Depends during the nighttime in case he has an accident." (EX-2, pp. 24-29).

Since Claimant cannot drive, Dr. Lindemann recommended medical transportation to Claimant's doctors, therapy visits and other medical appointments. He does not need "24-hour chauffeur service." Dr. Lindemann called it medical transportation rather than caregiver assistance because it is "typically what [he] orders for [his] home health patients, for one thing, that need

transportation. It's medical transportation that's provided." Dr. Lindemann does not know the cost of medical transportation. He explained the difference between medical transportation and caregiver assistance as Claimant does not "need a caregiver 24-hours a day" to drive him around. However, because Claimant needs someone other than himself behind the wheel, Dr. Lindemann recommended medical transportation be provided to Claimant for his therapy and physician appointments. (EX-2, pp. 29-32).

Dr. Lindemann testified Claimant should not have 24-hour assistance just because "he may have a rare accident." Claimant is on a bowel program and "should be he having bowel movements in the evening with the use of a Theravac enema. That's what spinal cord injured patients do." (EX-2, pp. 35-36).

According to Dr. Lindemann, the psychological status of a spinal cord injured patient was not always precarious and did not always need to be addressed during the rehabilitation process. He felt these issues can be addressed, by a treating physician, during follow-up visits. (EX-2, p. 37).

Dr. Lindemann could not recall whether he read the recommendations of Claimant's treating social worker, Dr. Gilbert. Dr. Gilbert found Claimant's mental health improved through his hobbies of woodworking and welding. Dr. Lindemann would restrict Claimant from these hobbies for "safety reasons. Somebody with poor dexterity with the right arm should not be welding." Because Claimant's hobbies are unsafe, Dr. Lindemann "would discourage it" because Claimant has poor control over his right upper and lower extremity and it is not safe for him to weld." Dr. Lindemann has not seen Claimant weld or woodwork, nor has Claimant described his participation in such activities. "When somebody with poor movement in the right arm, poor coordination in the right arm, as well as weakness, tells me they want to weld, I tell them you should not be welding." (EX-2, pp. 37-39).

For Claimant's mental health and emotional well-being, Dr. Lindemann recommended Claimant participate in any activity, outside his home, which he could do safely. Dr. Lindemann disagreed that Claimant should have a caregiver there to assist him in doing those activities. If an activity is unsafe, Dr. Lindemann would not recommend Claimant do them. If Claimant cannot do it at all without assistance, then he should not participate in the activity. Claimant's hobbies should be things he can do by himself safely without any assistance. (EX-2, pp. 39-42).

Dr. Lindemann acknowledged Claimant was not completely paralyzed, but hemiparetic on one side. He disagreed with Dr. Leglue and Dr. Rosenbloom's opinion that Claimant was 65% whole-body impaired. Dr. Lindemann did not assign Claimant a whole-body impairment rating. (EX-2, p. 43).

Although Claimant was unable to tie his shoes, Dr. Lindemann explained "he could wear Velcro straps on his shoes to where he wouldn't need to tie them." (EX-2, p. 43).

Dr. Lindemann also disagreed with the recommendation that Claimant have rubdowns with liniment or topical analgesics during the day. Although Claimant's treating doctor recommended the rubdowns, Dr. Lindemann "as an independent opinion . . . didn't feel like he required that." Since Dr. Lindemann disagreed with the necessity of recommended rubdowns, he would not opine whether Claimant needed a caregiver for such rubdowns. (EX-2, pp. 43-44).

Dr. Lindemann could not recall whether Claimant needed assistance getting up after a fall. If, "in the rare event," Claimant fell and could not get up, he should "call 911 or a family member" for assistance. Dr. Lindemann concluded Claimant's falls were a "rare event" because Claimant "never mentioned having frequent falls." (EX-2, pp. 46-47).

On follow-up examination, Dr. Lindemann testified that he sees patients with Claimant's injuries live independently. He has also seen them "return to work in some capacity, however limited they may be." (EX-2, pp. 47-50).

Dr. Lindemann reiterated he was not sure whether Claimant was able to take the AFO off by himself; however, he also stated "[m]ost patients with a good left arm, they're able to take and place the AFO without difficulty." Dr. Lindemann characterized Claimant's left arm as "good." Dr. Lindemann opined Claimant did not need to wear the AFO at night and only needed the AFO for walking. Typically the AFO should be put on in the morning and taken off at night by the caretaker. This time was taken into consideration in determining Claimant only needed caregiver assistance two hours in the morning and two hours in the evening. (EX-2, pp. 53-54).

Although Dr. Lindemann disagreed with the necessity of rubdowns, he opined the two hours in the morning and two hours

in the evening were sufficient time to complete all necessary rubdowns. (EX-2, p. 56).

On re-cross examination, Dr. Lindemann admitted his understanding of Claimant's bowel and bladder status was as of July 2002. Dr. Lindemann had not reviewed any medical records from Dr. Alvarez who treated Claimant in 2004 for alternating constipation and diarrhea. Dr. Lindemann's opinions were based on medical records provided at or prior to July 1, 2002. (EX-2, p. 57).

Although Dr. Lindemann testified Claimant should "definitely not be" driving a tractor, he believed Claimant should be evaluated for his ability to drive a motor vehicle. "If he passes a driving evaluation for a car, then at that point I may recommend that he drive a tractor. But at this point, he is not recommended to drive a tractor or a vehicle until he takes a driving evaluation." A driving evaluation measures "cognitive ability, reaction time, and actually driving a vehicle." There is nothing with Claimant's cognitive ability preventing him from driving a tractor. It is Claimant's functional ability that keeps him from driving a tractor and a motor vehicle. Claimant's functional ability affects his reaction time. Claimant's right-sided weakness is the functional ability that prevents him from driving because of difficulty steering, accelerating, and stopping, making it unsafe. Even though the "gas" or accelerator is done by hand on a tractor, Claimant has right upper extremity weakness. (EX-2, pp. 58-59).

The Contentions of the Parties

Claimant contends he is physically impaired to the extent that he requires a regular, dependable, and compensated caregiver assistant at least 12 hours per day. He further contends his wife and family have been providing this caregiver assistance virtually 24-hours per day, but with compensation for only six hours per day. Claimant reasons that while his hands-on needs may be met by caregiver assistance for six hours per day, he needs somebody to be on standby to render assistance when needed. In addition, although the "reasonable and necessary" test requires a medical foundation it also requires a practical and humane application in the context of factual realities.

Claimant argues that the assistance he needs cannot be pre-regulated, pre-scheduled, or pre-prepared. Claimant maintains

Employer has no legal right to rely on the love, compassion or loyalty of Claimant's family for uncompensated caregiver assistance. Finally, Claimant contends he needs caregiver assistance on an "as-needed" basis and his wife has been his standby assistant in an uncompensated fashion since Claimant was discharged from Touro Medical Center. Therefore, Claimant contends caregiver payments should increase from six-hours per day up to 12-hours per day.

On the other hand, Employer contends its response to Claimant's injury has been appropriate and compassionate. Employer argues all of Claimant's needs can be met within the six hours per day of caregiver assistance provided by the Employer. Employer reasons that it has not only met its requirements under the Act, but has exceeded its duty. Therefore, Employer contends caregiving compensation should remain at six hours per day.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Attendant Care Benefits

Employer is liable for reasonable and necessary home care related to Claimant's work injury. Falcone v. General Dynamics Corp., 21 BRBS 145 (1988); Timmons v. Jacksonville Shipyards, Inc., 2 BRBS 125 (1975); see also Edwards v. Zapata Offshore Co., 5 BRBS 429 (1977); Director, OWCP v. Gibbs Corp. [Elliot], 1 BRBS 40 (1974); 20 C.F.R. § 702.412(b). Specifically, 20 C.F.R. § 702.412(b) states in pertinent part:

(b) The Director . . . may also order the employer or the insurance carrier to provide the employee with the services of an attendant, where . . . services necessary, because the employee . . . has lost the use of both hands, or both feet or is paralyzed and unable to walk, or because of other disability making the employee so helpless as to require constant attendance in the discretion of the district director.

A family member may be compensated by Employer for attendant care services. Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978); Timmons v. Jacksonville Shipyards, Inc., 2 BRBS 125 (1975).

Claimant seeks to increase the total number of hours per day he receives caregiver assistance from six hours to 12 hours per day. There are few cases on this subject which can provide guidance.

The Board has upheld 24-hour care as reasonable when "there is no dispute over the number of hours claimant must be watched." Carroll v. M. Cutter Co. Inc., 38 BRBS 53, 54 (2004). The claimant in Carroll needed assistance "not necessarily for assistance with daily needs, but for safety, redirection and prevention of injuries." 38 BRBS at 54. The claimant was capable of eating, dressing, bathing, and toileting by himself, but needed 24-hour supervision because he was unaware of his surroundings, put himself in harms way, got lost and forgot things. Id. Unlike the claimant in Carroll, Claimant needs assistance bathing, dressing and toileting, but does not put himself in harms way or become unaware of his surrounding.

The only dispute in Carroll was whether Employer was responsible for non-professional care as well as professional care. The Board held that Employer was responsible for both.

Carroll, 38 BRBS at 55. The Board reasoned that all of claimant's medical providers agreed he needed 24-hour supervision and therefore found employer fully liable for the prescribed 24-hours care. Id. The Board did not distinguish between professional and non-professional attendant care when determining the amount of hours of care which was necessary. In the instant case, both Claimant's treating physician and Employer's physician agree Claimant only needs hands-on assistance four hours per day.

Dr. Lindemann opined Claimant needed two hours of caregiver assistance in the morning and two hours in the evening. In response, Employer awarded Claimant three hours in the morning and three hours in the evening to include Claimant's hobbies and transportation needs. Claimant's treating physician, Dr. Leglue, agreed stating "although hands-on time may be approximately six hours a day, the time frame that he requires assistance is unpredictable and unreliable." Regardless of when Claimant may necessitate caregiver assistance, at no time did Dr. Leglue specifically opine Claimant needed more than six-hours of caregiver assistance. In addition, while I agree that some of Dr. Lindemann's responses were evasive, his opinion did not conflict with Claimant's own treating physician.

Specifically, Claimant testified and his wife and mother confirmed it takes him about one hour to one and one-half hours to get ready in the morning. This time includes eating, dressing, showering and toileting. Claimant's wife helps him get out of bed and into the shower. She also helps him get dried off and dressed, including securing his AFO. At night, Claimant's wife reverses the procedure and helps him to bed. Claimant testified this never takes longer than one to one and one-half hours. Claimant also tends to take naps on the days he goes to physical therapy. He needs help undressing for the naps because it is uncomfortable to sleep with the AFO on. There are days however, when Claimant is more functional than others and can do most of these activities by himself. Nevertheless, both Claimant's wife and mother admitted these tasks can be completed while they perform other household tasks and tend to the children. Therefore, it is unlikely that it takes even one hour of assistance for Claimant to get ready in the morning or to get ready for bed.

Claimant needs assistance to the bathroom when he is not wearing the AFO and sometimes has accidents in bed. Accidents mean Claimant urinated or soiled himself before getting to a bathroom. Although Claimant testified he does not have "very

much control" over his bowel or bladder, he also testified his last accident was about one month ago. Claimant's wife testified his last accident was "within the last three months." Claimant's accidents are not an everyday occurrence, yet Claimant wants attendant care benefits awarded as if they were. The undersigned cannot ignore Claimant's own testimony. I find there is sufficient extra time in the six hours of caregiver benefits provided to include any time necessary for changing Claimant and the sheets after such an accident.

Claimant has never cooked and cannot now request this time be added to attendant care benefits. Claimant's wife always prepared meals, even prior to his injury. (Tr. 33-34).

The Board will not question the number of hours of caregiver assistance requested when Employer does not challenge the amount. Falcone v. General Dynamics Corp., 21 BRBS 145 (1988). In Falcone, employer only disputed whether claimant should remain at home or in a nursing home, the number of hours awarded for caregiver assistance was not challenged by the employer and therefore upheld by the Board. 21 BRBS 147. The Board granted 18-hours per day of home health care services relying on claimant's doctor's opinion that claimant would be better off at home with his family then cared for in a nursing home. 21 BRBS 145 (1988). The instant case differs from Falcone in that Employer challenged the amount of hours Claimant requires for home attendant care.

The undersigned agrees that family members should not have to assume total responsibility for supervision of Claimant without pay for portions of the day when they would be with him anyway. However, although Claimant maintains his wife and mother have been on 24-hour standby assistance, the testimonial and medical evidence does not support 12-hour per day attendant care.

In addition, without clarifying testimony from Dr. Leglue, the undersigned is unable to ascertain what the doctor meant by "standby" and must discern an appropriate definition under the circumstances. Even if Claimant received caregiver assistance from someone outside his family, the testimony and evidence does not support more than six hours of attendant care per day. Additionally, Dr. Leglue's comparison of Claimant's caregiver needs to a fireman who is on-call 24 hours a day but may only be needed for a short period of time is not persuasive. Claimant's testimony specifically discussed all the required assistance he

experienced throughout the day and failed to establish the necessity for 12-hour caregiver assistance per day.

The record supports a finding that Claimant's mental health necessitates his participation in hobbies, however, considering Claimant's disabilities, the undersigned agrees with Dr. Lindemann that welding, woodworking, and driving a tractor are unsafe activities, under the circumstances, which cannot justify additional attendant care benefits.

As for medical transportation, Claimant travels to Alexandria three days a week for massage therapy and his wife drives him to these appointments. Claimant and his wife both testified she does not go into the appointments with him, but runs errands during such times. Therefore, I find that an additional one hour, three days a week, for transportation to and from Claimant's medical appointments is necessary and appropriate in conformity with Dr. Lindemann's opinion.

Claimant does not need much assistance regarding potential falls because his "falls have leveled out over the last couple of years" and he is able to pull himself up if he falls and there is something for him to grab onto. The last time Claimant fell was about three weeks prior to the formal hearing. Since Claimant's falls are so uncommon, on-call assistance cannot be justified. During these rare occasions where Claimant falls or has an accident and no one is around to assist him, Claimant has a cellular phone and can call someone for assistance. This is not an order for family members to assist Claimant without compensation, but for Claimant to be realistic with his needs. Claimant has become a modified independent and can care for himself. Claimant appears to only need assistance dressing and ambulating without his AFO. The record supports a finding that Claimant is able to do all other activities independent of caregiver assistance.

Claimant's wife also prepares his medications for him; however, it only takes her 15-20 minutes a week. Once Claimant's wife prepares his medication, Claimant can open and take his medication by himself. (Tr. 42).

Claimant has failed to establish that 12-hours per day of caregiver assistance is either reasonable or necessary. "Although neither Section 7 of the Act nor the regulations explicitly assign the burden of proof, claimant is not relieved of the burden of proving the elements of [his] claim for medical benefits." Schoen v. U.S. Chamber of Commerce, 30 BRBS 112, 114

(1996) citing Maryland Shipbuilding and Drydock Co. v. Jenkins, 10 BRBS 1 (1979); see also Director, OWCP v. Greenwich Collieries, 28 BRBS 43 (1994). Claimant has failed to establish by a preponderance of the evidence that he requires 12-hour standby assistance per day of caregiving needs. In fact, the record supports a conclusion that Claimant only needs on average six-hours of "standby" assistance per day as he does not always need help getting ready in the morning or evening, rarely has accidents or falls, and only goes to his doctors three times per week. There has been no showing that 12-hours per day of caregiver assistance is either reasonable or necessary.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant is entitled to caregiver assistance for six hours per day on the weekends.
2. During the week, Claimant is entitled to caregiver assistance for six hours a day for two days of the week and seven hours a day for three days of the week for transportation to and from medical appointments and caregiver assistance.
3. In all other respects, Claimant's claim is **DENIED**.

ORDERED this 3rd day of February, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge